In the Supreme Court of the United States

Term, 197
No. 78-907

GERALD R. CAIN,

Petitioner

v.

JOSEPH MAZURKIEWICZ

and

THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

and

DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MORRIS PAUL BARAN
EUGENE H. CLARKE, JR.
Attorneys for Petitioner

600 Penn Square Building
Philadelphia Pa. 19107

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Gerald R. Cain, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court Appeals for the Third Circuit entered in the above entitled case on September 7, 1978.

OPINIONS BELOW

The unreported opinion of the District Court for the Eastern District of Pennsylvania, adopting and incorporating the Report and Recommendation of the United States Magistrate, is set out as Appendix B, p. 6a, infra.

JURISDICTION

The order of the Court of Appeals for the Third Circuit was entered on September 7, 1978. A petition for a rehearing en banc of the Court's decision was denied on September 28, 1978. This petition for certiorari was filed within ninety days of the order denying the rehearing. This court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Where, in a circuit court en banc decision holding unconstitutional a State practice giving trial courts unfettered discretion to decide whether to charge the jury on voluntary manslaughter absent evidence of provocation, three judges further hold that the decision should apply to cases on direct review in the State, and where a circuit court panel, as dicta in a subsequent collateral attack, holds that the decision will not apply to pending direct appeals, do the interests of fairness and justice require that the en banc decision apply to a direct appeal in the State?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Fourteen, Section One.

> All persons, born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Gerald R. Cain, petitioner herein, was convicted in the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, at Nos. 2179, 2180, 2181, 2182, June Session, 1971, of first degree murder, aggravated robbery, burglary and conspiracy. The sentence imposed was life imprisonment.

After post-verdict motions for a new trial were denied, petitioner filed a direct appeal with the Pennsylvania Supreme Court, asserting as one of his several grounds for relief that he was denied due process and equal protection of the law when the trial court refused a specific request to charge the jury on voluntary manslaughter.

The brief and oral argument presented to the Pennsylvania Supreme Court on January 22, 1974, noted the Federal District Court decision in *United States of America ex rel. William Matthews v. Robert L. Johnson, Supt.*, Civil Action No. 73-159 (1973), which held that, under Pennsylvania practice, the absence of standards or guidelines gave the trial court unfettered discretion in murder trials to decide whether to charge the jury on voluntary manslaughter when there is no evidence to support such a verdict and, therefore, offended due process and entitled relator in that case to relief. During oral argument, petitioner in the instant case cited this decision and advised the court of the pendency of an appeal which had been argued in the Third Circuit Court of Appeals one week earlier. *United States of America ex rel. William Matthews v. Robert L. Johnson*, 503 F.2d 339 (3rd Cir., 1974), cert. denied sub nom. *Cuyler v. Matthews*, 420 U.S. 952 (1975). [Hereinafter: *Matthews.*]

A rehearing of *Matthews* took place before the Third Circuit en banc on August 15, 1974; judgment was entered affirming the District Court's decision. In the opinion, Judges Aldisert, Rosenn and Weiss addressed the issue of retroactivity and held that *Matthews* should apply to cases on direct appeal. *Matthews*, supra.

On January 28, 1977, three years later, petitioner's conviction was affirmed by the Pennsylvania Supreme Court by virtue of an evenly divided decision. *Commonwealth v. Cain*, 471 Pa. 140, 369 A.2d 1234 (1977) [hereinafter: *Cain*]. The opinion in support of affirmance cited *United States ex rel. Cannon v. Johnson*, 536 F.2d 1013 (3rd Cir. 1976), cert denied, *Cannon et al. v. Johnson, Executive Director, Board of Probation and Parole*, 429 U.S. 928 (1976) [hereinafter: *Cannon*]. *Cannon*, which involved a collateral attack, was decided by a panel of three which held, by way of dicta, that *Matthews* would not be applicable to cases pending on direct review.

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania which was denied on January 11, 1978. However, the District Court, noting the inconsistency between the opinion of Judges Aldisert, Rosenn and Weiss in *Matthews* and the dicta of the panel in *Cannon*, found probable cause for appeal. App. B, pp. 6a-7a, infra.

Without oral argument and without opinion, a panel of the Third Circuit Court of Appeals summarily affirmed the District Court's denial of the petition for writ of habeas

corpus on September 7, 1978. App. A, pp. 3a-5a, infra.

On September 28, 1978, petitioner's request for a rehearing en banc was denied. App. A, pp. 1a-2a, infra.

REASONS FOR GRANTING THE WRIT

1. Consequences of Not Applying New Constitutional Principles to Cases on Direct Appeal

Petitioner was one of a series of defendants, who, on direct appeal to the Pennsylvania Supreme Court, challenged the constitutionality of the practice which gave the trial judge absolute discretion to decide whether or not to charge the jury in a murder trial on voluntary manslaughter when no evidence of passion or provocation existed. A majority of the justices of that court had consistently declined to reach the constitutionality question and, despite strong dissent, the practice had been upheld.

In his brief and oral argument, petitioner advised the court that this practice had been held by the Federal District Court to violate due process and equal protection of the law. He also advised the court of the pendency of an appeal which had just been argued in the Third Circuit. *Matthews*, supra. Although so apprised, the Pennsylvania Court soon thereafter decided *Commonwealth v. Jones*, 457 Pa. 563, 319 A.2d 142 (1974) [hereinafter: *Jones*], which again, by virtue of an evenly divided decision, avoided the constitutionality issue and announced that, under the supervisory power of the court, henceforth, the trial judge must instruct the jury on voluntary manslaughter when requested.[1]

[1] The court further held that, because Mr. Jones had been convicted of first degree rather than second degree murder, he had not been prejudiced and, therefore, his conviction was affirmed.

Shortly after *Jones*, the Third Circuit en banc held that the Pennsylvania practice offended due process. *Matthews*, supra. Three judges, addressing the retroactivity issue, held further that *Matthews* should apply to cases on direct appeal in the Pennsylvania courts.[2] Id. at 349.

Although petitioner's argument before the Pennsylvania Supreme Court was heard in January of 1974, *Jones* was decided in May of 1974, and *Matthews* in August of 1974, no opinion was rendered in petitioner's case until January of 1977. *Cain*, supra.

The District Court, in *United States ex rel. Cannon v. Johnson*, 396 F. Supp. 1362 (E.D. Pa. 1975) [hereinafter: *Dist. Cannon*], held that *Matthews* would not be given full retroactive effect. Recognizing that the on-direct-appeal issue was not squarely before it, the court limited its holding to collateral attacks. Id. at 1373. Nonetheless, on appeal, a panel of three judges of the Third Circuit, in a decision admittedly "broader than is essential for the instant appeals", further held that "*Matthews* is inapplicable to pending or future appeals from pre-*Matthews* murder verdicts." *Cannon*, supra at 1016-17.

Although noting the inconsistency between *Matthews* and *Cannon* and that, as to cases on direct appeal, *Cannon* was dicta, the Pennsylvania Supreme Court, in an evenly divided decision, affirmed petitioner's conviction. *Cain*, supra. The opinion in support of affirmance accorded

[2] The court rejected the identical reasoning used by the Pennsylvania Court to affirm the conviction of *Jones* with the anomalous result that Mr. Matthews, whose conviction was already final in Pennsylvania, received the benefit of the new rule, while Mr. Jones, as a result of his direct appeal, did not.

Cannon greater weight, in part, because "it represents the Third Circuit Court's most recent expression on the subject." Id. at 160.

The events described and their timing serve as clear illustrations of exactly those concerns expressed by Mr. Justice Harlan in his separate opinion in *Mackey v. United States*, 401 U.S. 677, 28 L.Ed. 2d 404, 91 S.Ct. 1160 (1971) [hereinafter: *Mackey*].

Among the "additional significant untoward consequences" of not requiring that cases on direct review be decided in accord with newly enunciated constitutional rules is that courts are encouraged to avoid "responsibility for developing or interpreting the Constitution." Id. at 680. Here, a majority of the Pennsylvania Supreme Court exhibited a persistent disinclination to address the constitutionality of the Pennsylvania practice. Even after that issue was resolved in *Matthews*, the court chose to delay three more years before deciding the case at bar.

A second "untoward consequence" is the inconsistency that arises when, as between two defendants raising the same issue contemporaneously in two different tribunals, one is given the benefit of the new rule but the other is denied the benefit on the basis of a subsequent decision that the rule will operate prospectively only. See *Mackey*, supra at 680. Here, *Matthews* was argued before the Third Circuit just one week prior to petitioner's argument before the Pennsylvania Court. Yet, Mr. Matthews, whose conviction was final in Pennsylvania in 1971, received the benefit of the rule, while petitioner, still on direct appeal, was denied the benefit on the basis of the subsequent *Cannon* dicta.

A third "untoward consequence" of "[r]efusal to apply new constitutional rules to all cases arising on direct review" is the chilling effect on the defendant with limited resources who may be deterred from pursuing his constitutional rights because, although these rights may eventually be vindicated, he may not reap the benefit. *Mackey*, supra at 680.

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2. Effect of the Use of Dicta

Petitioner's argument before the Pennsylvania Supreme Court predated the decisions in *Jones, Matthews* and *Cannon*. Since his appeal was grounded on the constitutionality question, retroactivity was not in issue at all at the time. Yet, the decision rendered by the Pennsylvania Court rested solely on that issue, which petitioner had no opportunity to argue.

In *Dist. Cannon*, the court utilized data supplied by the Commonwealth to apply the three-pronged test summarized in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967) [hereinafter: *Stovall*], which requires consideration of:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."
>
> Id. at 297.

The court, after concluding that the purpose of the *Matthews* rule is not to enhance truth-finding, made the

factual determination from the data that "the Commonwealth relied heavily on the prior rule" and "that retroactive application of the *Matthews* standard would have an adverse impact on the administration of justice."[3] *Dist. Cannon*, supra at 1371. Mr. Cannon did not contest the data, viewing them as irrelevant to the theory of his case. Id. at 1373. The Third Circuit concurred with the *Stovall* criteria determinations in *Dist. Cannon* and, citing *Stovall* as the basis for further concluding that no distinction is warranted between collateral attacks and direct appeals, held that *Matthews* does not apply to cases on direct review. *Cannon*, supra at 1016-17.

Thus, the on-direct-review had never received adversarial treatment when the Pennsylvania Court decided *Cain*. The opinion in support of reversal noted:

> "The (Cannon) panel's pronouncement on an issue not presented is troublesome, particularly since the precise issue was then pending before this court." *Cain*, supra at 165, fn. 22.

The opinion in support of affirmance, however, fully adopted the *Cannon* dicta and added the further gloss that the distinction between collateral attacks and direct appeals no longer has any "vitality" and, therefore, once full retroactive effect is denied, no consideration for direct appeals is constitutionally mandated.[4] Id. at 163-4.

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[3] Even assuming the data to be valid, the inference drawn with respect to reliance on the old rule is arguable since the question arises as to what extent that reliance resulted from the continued reluctance of the Pennsylvania Court to address the constitutionality issue.

[4] Since full retroactive effect invariably imposes a severe burden on the administration of justice, new rules which do not

Petitioner then sought relief in the District Court which denied relief on the grounds that it was "constrained" by the discussion in *Cannon*. App. B, pp. 6a-7a, infra. Nevertheless, noting the inconsistency between *Matthews* and the *Cannon* dicta, the court found probable cause for appeal. App. B, pp. 6a-7a, infra.

The Third Circuit panel assigned to petitioner's case dispensed with oral argument and entered a judgment order which listed petitioner's contentions followed by the one-sentence statement, "We find no error in the rejection of these grounds for habeas corpus relief." App. A, p. 4a, infra. The panel offered no reason or insight into its action. In rejecting, without opinion, petitioner's contention that *Matthews* should apply to him, it was not clear whether the panel affirmed the lower court's order on the basis that the dicta in *Cannon* was dispositive or on the basis of an independent consideration of the on-direct-appeal factual situation before it. Since the panel saw fit to neither expand nor clarify the *Cannon* holding, the more reasonable assumption is the former. The refusal of petitioner's request for a rehearing dispels any further doubt.

By allowing the *Cannon* dicta to stand unaltered in a direct appeal case, the Third Circuit has effectively adopted as the law of the Circuit the same position as that of the Pennsylvania Court, to wit: once full retroactivity is denied, no consideration is mandated for direct appeals. The necessary corollary is that all new constitutional rules will be given either full retroactive effect or only prospective effect.

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enhance truth-finding will inevitably be denied full retroactive effect. Thus, the logical extension of the Pennsylvania view is that the *Stovall* criteria are no longer viable.

This Court has never held that retroactivity to cases on direct appeal will be allowed only if full retroactive effect is accorded. Thus, the Third Circuit's position that the *Cannon* dicta disposes of petitioner's case is contrary to the decisions of this Court. See: *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965); *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590 (1974); *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed. 2d 642 (1974).

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3. Unfairness of Not Applying New Constitutional Rules to Cases on Direct Appeal

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In addition to the unfairness inherent in applying dicta in a collateral attack case to a direct appeal in deciding the scope of retroactivity, the gravamen of petitioner's appeal to the Third Circuit centered on the injustice of not deciding cases on direct appeal in accord with the then known law.

The three justices of the Pennsylvania Supreme Court supporting reversal of *Cain's* conviction held that *Matthews* should apply to petitioner "in accord with the rule established 175 years ago in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801)". *Cain*, supra at 173 (Citations omitted.)

> "This way individuals who are similarly situated are awarded the same treatment by the courts, and the court's duty to administer equal justice is preserved." Id.

They urged further that although the *Stovall* criteria are appropriate for determining the scope of retroactivity for col-

lateral attacks, these criteria should not be the basis for dealing with the on-direct-appeal situation. Id. at 192. In support of this position, they cited Mr. Justice Harlan's approach in *Mackey*, supra. In discussing the rationale underlying judicial review, Mr. Justice Harlan in a separate opinion, stated:

> "Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases to flow by unaffected by that new rule constitutes an indefensible departure from this model of judicial review." *Mackey*, supra at 679.

Mr. Justices Powell and Marshall, in separate opinions in *Hankerson v. North Carolina*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977), both urge the adoption of Mr. Justice Harlin's view that courts apply new constitutional rules to all cases pending on direct review. Mr. Justice Powell, noting the unfairness of not giving retroactive effect to cases on direct review, stated:

> "(O)ne chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application while others similarly situated have their claims adjudicated under the old doctrine." Id. at 247.

There are strong societal interests in preserving criminal convictions finalized before a new constitutional rule is announced. However, it is far more difficult to justify different treatment for two defendants in the same "stream", who raise the same issue contemporaneously on the basis of administrative concerns. A distinction between those constitutional rules which warrant complete retroactivity and those which do not is consistent with societal interests

in finality yet does not deny equal treatment under the law for similarly situated defendants. On the other hand, a distinction between similarly situated defendants, based largely on the degree of administrative burden imposed when the new rule does not enhance truth-finding, sacrifices equality for convenience.

Mr. Justice Marshall observed that the court's current approach to the problem of retroactivity has not effectively reduced the costs or resolved the anomalies. Id. at 245. Indeed, the anomalies which resulted here from a prospectivity ruling two years after *Matthews* could have been diminished by a policy of applying new rules to cases on direct appeal.

The costs of such a policy are not necessarily as extensive as imagined. Of the cases estimated by the Commonwealth in *Dist. Cannon* as possibly being affected by applying *Matthews* to direct appeals (some of which might warrant new trials anyway on other grounds), the cost of reversing these convictions would be offset by a lesser burden on the Pennsylvania Supreme Court which could promptly dispose of them by per curiam opinions.

With the rapid emergence of new constitutional doctrines of criminal procedure, a stated policy by this Court would decrease the need for extensive case-by-case litigation to determine the scope of retroactivity for each new rule.

CONCLUSION

It is, therefore, respectfully submitted that a writ of certiorari should issue to review the decision of the Third Circuit.

Respectfully submitted,
MORRIS PAUL BARAN,
EUGENE H. CLARKE, JR.,
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-1294

CAIN, GERALD R.,
Appellant

vs.

Mazurkiewicz, Joseph and The Attorney General of the State of Pennsylvania and District Attorney of Philadelphia

(D. C. Civil No. 77-2834)

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge*, Aldisert, Adams, Rosenn, Hunter, Weis, Garth, *Circuit Judges*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(s) John J. Gibbons
Judge

Dated: September 28, 1978

UNITED STATES COURT OF APPEALS
For the Third Cirucit

No. 78-1294

CAIN, GERALD R.,
Appellant

vs.

Mazurkiewicz, Joseph and The Attorney General of the State of Pennsylvania and District Attorney of Philadelphia

(D. C. Civil No. 77-2834)

On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

Submitted Under Third Circuit Rule 12 (6)
September 5, 1978

Before Gibbons, Hunter and Garth, *Circuit Judges*

Eugene H. Clarke, Jr., Esquire, 805 One East Penn Square Building, Philadelphia, Pennsylvania 19107.

Morris Paul Baran, Esquire, 600 Penn Square Building, Philadelphia, Pennsylvania 19107, Attorneys for Appellant.

Paul S. Diamond, Assistant District Attorney, Michael F. Henry, Chief, Motions Division, Steven H. Goldblatt, Deputy District Attorney for Law, Edward G. Rendell, District Attorney, Centre Square West, Suite 2400, Philadelphia, Pennsylvania 19102, Attorneys for Appellee.

JUDGMENT ORDER

Gerald R. Cain appeals from the denial of habeas corpus relief from his confinement pursuant to a Pennsylvania murder conviction. He contends:

(1) That the ruling in *United States ex rel Matthews v. Johnson,* 503 F.2d 339 (3d Cir. 1974), *cert. denied sub nom Cuyler v. Matthews,* 420 U.S. 952 (1975) should have been applied to his case;

(2) that the state court erred in excluding the testimony of Dr. James D. Nelson;

(3) that the prosecutor made knowing use of false testimony in his state trial.

We find no error in the rejection of those grounds for habeas corpus relief.

It is therefore ORDERED and ADJUDGED that the judgment of the District Court is affirmed. Costs taxed against appellant.

By the Court,
(s) John J. Gibbons
Circuit Judge

Attest
(s) M. Elizabeth Ferguson
Acting Clerk

Dated: September 7, 1978

Certified as a true copy and issued in lieu of a formal mandate on October 6, 1978.

Test: (s) M. Elizabeth Ferguson
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Copy

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2834

GERALD R. CAIN

v.

JOSEPH MAZURKIEWICZ and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

ORDER

AND NOW this 11 day of January, 1978, after careful and independent consideration of relator's petition for a writ of habeas corpus and after review of the Report and Recommendation of the United States Magistrate, IT IS ORDERED that:

1. The Report and Recommendation is approved and adopted.

2. The petition for writ of habeas corpus is DENIED without an evidentiary hearing.

3. There is probable cause for appeal. This court is constrained by the Third Circuit Court of Appeals'

discussion in *United States ex rel. Cannon v. Johnson,* 503 F.2d 1013, 1015-7 (3d Cir. 1976), to hold that *United States ex rel. Matthews v. Johnson,* 503 F.2d 339 (3d Cir. 1974) (en banc), *cert. denied,* 402 U.S. 952 (1975), should not apply retroactively to cases pending on appeal when *Matthews* was decided. The tests employed by the Court of Appeals in deciding the retroactivity issue in *Cannon* have recently been affirmed in *Hankerson v. North Carolina,* U.S. , 53 L.Ed. 2d 315-316 (1977). The court notes, however, that the Court of Appeals decision by way of dicta in *Cannon* is inconsistent with the opinion of Judges Aldisert, Rosenn, and Weis in *Matthews. Cf.* Judge Weis' concurring opinion in *Cannon,* 536 F.2d at 1017.

By the Court:

(s) Edward N. Cahn
Edward N. Cahn,
J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2834

GERALD R. CAIN

v.

JOSEPH MAZURKIEWICZ, Superintendent

and

THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

REPORT AND RECOMMENDATION

PETER B. SCUDERI, UNITED STATES MAGISTRATE, December 1977:

Gerald Cain, relator, has filed a petition for writ of habeas corpus stemming from his March 30, 1972 conviction. Cain was tried on charges of murder, aggravated robbery, burglary, conspiracy, and narcotics offenses arising out of an aborted narcotics sale to the deceased. The jury returned a verdict of guilty of first degree murder.[1]

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[1] *Commonwealth v. Gerald R. Cain*, June Sessions 1971, Numbers 2179-2182, February Sessions 1972, Number 1813 in the Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania.

Post-trial motions were argued and denied on November 10, 1972.

The sentence imposed by the trial court was life imprisonment.

Relator attacked the conviction by way of direct appeal to the Supreme Court of Pennsylvania. Being equally divided, the Court affirmed the judgment of sentence on January 28, 1977. *Commonwealth v. Cain*, 369 A.2d 1234 (1977).

In his present petition for federal habeas corpus relief, relator alleges the following grounds:

(1) Denial of equal protection for failure of the trial court to charge the jury on voluntary manslaughter after relator's attorney requested such a charge;

(2) Denial of due process in the trial court's failure to permit an expert to testify as to the effects of narcotic drugs; and

(3) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defense evidence favorable to defendant while permitting testimony that was false in material respects.

Relator is presently in custody in Bellefonte, Pennsylvania.

Each of the above contentions was raised in the State process. Therefore, relator has fulfilled the requirement of exhaustion of state remedies under 28 U.S.C. 2254 (b).

Because each of these contentions has been thoroughly reviewed during the trial and the trial record is adequate for the purposes of this petition, an evidentiary hearing is not necessary.

DISCUSSION

I. *The Trial Court's Denial of Requested Charge on Voluntary Manslaughter*[2]

Following is a chronology of dates and events necessary to evaluate petitioner's position with respect to his first habeas corpus ground.

On May 26, 1971, relator was arrested and charged with murder, aggravated robbery, burglary, conspiracy, and narcotics offenses.

In the June 1971 trial, the defense submitted to the Trial Judge the following points for charge:

> 49. Under an indictment for murder, you may return a verdict of voluntary manslaughter.
>
> 51. An unlawful killing without malice is manslaughter. If there is a specific intent to kill but

[2] Respondent charges (p. 3 of his brief) that relator failed to meet the exhaustion requirement as per this ground. It is alleged that before the Pennsylvania Supreme Court relator challenged the *arbitrariness* of the trial judge's decision on whether to charge on voluntary manslaughter, whereas relator *now* bases his claim on the retroactivity of the *Matthews* ruling, *infra.*, and denial of equal protection. Clearly, however, the issues from relator's standpoint are the same. The ground for seeking the writ of habeas corpus is the denial of equal protection for failure of the trial court to charge on voluntary manslaughter. Further, the Pennsylvania Supreme Court did confront the issue of *Matthews'* retroactivity (see discussion, *infra.*). See *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Moore v. DeYoung*, 515 F.2d 437, 445 (3d Cir. 1975); *United States ex rel. Geisler v. Walters*, 510 F.2d 887, 892 (3d Cir. 1975); *United States ex rel. Johnson v. Johnson*, 531 F.2d 169 (3d Cir. 1976).

> malice is negated by passion and hot blood, it is voluntary manslaughter. If there is no such specific intent to kill and no malice, it is involuntary manslaughter.
>
> 53. The four possible verdicts in this case on the murder indictment are:
>
> (a) Guilty of murder in the first degree;
>
> (b) guilty of murder in the second degree;
>
> (c) guilty of voluntary manslaughter;
>
> (d) not guilty.

All of these requested points were refused.

On appeal before the Supreme Court of Pennsylvania, Cain argued that he had been denied equal protection of the law by the Trial Judge's failure to charge on manslaughter as requested. Defense counsel cited the April 4, 1973 case of *United States of America ex rel. William Matthews v. Robert L. Johnson, Supt.*, Civil Action No. 73-159, in which District Court Judge Morgan Davis approved a report and recommendation that relator in a habeas corpus petition was entitled to relief where a state trial judge refused to charge on the issue of manslaughter in a murder case.

On January 15, 1974, the *Matthews* case was heard in the Third Circuit Court of Appeals.

On January 22, 1974, relator Cain advised the Pennsylvania Supreme Court of the pendency of the *Matthews* appeal.

A rehearing of the *Matthews* case took place before the Third Circuit en banc on May 15, 1974. On August

15, 1974, the Court affirmed the April 1973 judgment of the District Court. *United States ex rel. Matthews v. Johnson,* 503 F.2d 339 (3d Cir. 1974), *cert. denied* 420 U.S. 952 (1975). The Circuit Court held that, where, under Pennsylvania law, the jury had the power and prerogative to return a verdict of voluntary manslaughter in any murder prosecution, even where there was no evidence of provocation or passion which would require instruction on voluntary manslaughter, and where there were no legal standards to guide the judge in determining whether to submit a voluntary manslaughter instruction in the absence of such evidence, due process was denied in refusing a request for a voluntary manslaughter instruction.

Relator Cain argues that this ruling should be retroactively applied to his case.

In the *Matthews* case itself, the issue of retroactivity was not resolved with finality. Three judges in the en banc decision expressed the view that *full* retroactivity should *not* apply but that, where the trial was over and on appeal in the Pennsylvania courts at the time of the *Matthews* decision, then the new rule should apply. The majority of the *Matthews* court, however, was silent on the question of retroactivity.

On June 12, 1975, District Court Judge Becker of the Eastern District of Pennsylvania confronted the issue of the retroactivity of the Third Circuit's *Matthews* opinion. *United States ex rel. Cannon v. Johnson,* 396 F. Supp. 1362 (E.D. Pa. 1975). Basing his decision on the Supreme Court's guidelines for resolving issues of retroactivity of newly mandated constitutional standards for

criminal procedure,[3] Judge Becker concluded that the rule announced in *Matthews* ought not be accorded full retroactivity. The Judge limited his retroactivity holding to habeas corpus cases (as that presented before him) since the *Cannon* case "does not squarely raise the question of the applicability of *Matthews* to direct appeals before the Pennsylvania Supreme Court." 396 F. Supp. at 1373.[4]

Subsequently, in the consolidated appeals *United States ex rel. Cannon v. Johnson* and *United States ex rel. White v. Johnson,* 536 F.2d 1013 (1976), *cert. denied, Cannon et al. v. Johnson, Executive Director, Board of Probation and Parole,* 429 U.S. 928 (1976), a panel of three judges of the Third Circuit confronted the question of the retroactive effect to be accorded its en banc holding in *Matthews.*

Concurring in Judge Becker's analysis and application of the test for retroactivity, the three Circuit Court judges affirmed the denial of relief below and held that the decision in *Matthews* would not be applied retroactively in any respect either in habeas corpus review *or*

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[3] The Supreme Court has called for the consideration of three criteria in making such determinations: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall v. Denno,* 388 U.S. 293, 297 (1967); *Linkletter v. Walker,* 381 U.S. 618 (1965).

[4] The petitioner Cannon was convicted of first degree murder on June 25, 1970, and his conviction was affirmed by the Pennsylvania Supreme Court in 1973. Thus on direct appeal, Cannon, unlike Cain, did not yet have the benefit of the 1974 *Matthews* ruling.

on pending or future direct appeals from pre-*Matthews* murder verdicts. The Court held that due process was not violated where a request for a voluntary manslaughter instruction was denied.

By virtue of this holding, it must be concluded that Cain cannot avail himself of the *Matthews* ruling, since his trial predated the issuance of that ruling.

The Pennsylvania Supreme Court was equally divided on Cain's appeal, three justices affirming, three dissenting. The essence of the two opinions supporting affirmance was that the *Matthews* ruling did not have to be applied to cases on direct appeal. In his opinion for reversal, Justice Roberts, citing numerous Supreme Court cases, argued that:

> [o]n direct appeal a change in the law should be applied by the reviewing court even though the trial court may have acted in consonance with the state of the law at the time of its ruling. This way individuals who are similarly situated are awarded the same treatment by the courts, and the court's duty to administer equal justice is preserved.
>
> 369 A.2d at 1251

He challenged the appropriateness of the three-fold retroactivity test in determining the applicability of new rules to cases not yet finalized and expressed concern that some defendants were being denied the benefit of the new rule, bearing the burden of what is now recognized as an unjust rule.

Cain urges that Justice Roberts' argument is the correct one, that the ruling in the Third Circuit Court in *Matthews* is applicable to his case.

Although Justice Roberts' opinion appeals to any consideration of justice and equality and although in the *Matthews* case itself the newly enunciated rule was applied to the relator in that case, we are bound by the most recent word of the Third Circuit on this issue as expressed in *Cannon*. That word is, that the *Matthews* requirement that a request for a voluntary manslaughter instruction should always be granted, is not to be retroactively applied to any pre-*Matthews* verdicts.

We note, however, that the Third Circuit Court's decision in *Cannon* was by a panel of three and that the holding with respect to direct appeals is broader than was essential for the disposition of that case. The Court was faced with the habeas corpus appeals of two petitioners, each convicted by the Commonwealth of Pennsylvania for first degree murder. Petitioner Cannon was convicted in 1970 and his conviction was affirmed in 1973; petitioner White was convicted in 1968 and his conviction was affirmed in 1971. Thus in neither of these two cases did the Pennsylvania Supreme Court have the benefit of the 1974 *Matthews* ruling.

In Cain's case, however, the Pennsylvania Supreme Court did have the benefit of *Matthews*.

Thus, when the Circuit Court decided the issue of *Matthews'* retroactivity on direct appeals, that issue was not squarely before them on the facts since relators Cannon and White had already concluded their direct appeals.

In the case sub judice, it is apparent that the Pennsylvania Supreme Court was awaiting a decision from the Circuit Court on *Cannon* before deciding the direct ap-

peal of Cain. With the Cannon opinion before it the Supreme Court still divided evenly on the *Cain* case. Since the Circuit Court did not have the *Cain* factual situation before it when it decided *Cannon*, it is felt that relator should have that opportunity to present his case to the Circuit. Therefore, I would recommend that the petition for the writ be denied but that probable cause for appeal be certified.

II. *Trial Court's Refusal To Permit Expert Testimony*

The evidence adduced at trial reveals that Charles Green and the decedent, Glen Edwards, both college students in Ohio, came to Philadelphia on May 22, 1971, to purchase marijuana. The men came in contact with the relator, Gerald Cain, who offered to procure some marijuana for them. Cain entered into a plan with others to lure Edwards from his hotel room to a vacant house, on the pretense of consummating the sale, in order to rob him. On May 24, 1971, in the course of the robbery and in the presence of Gerald Cain, Edwards was fatally shot by Calvin Williams, one of the conspirators. The conspirators shared in the proceeds of the robbery.

The victim's body was discovered on May 26, 1971. After his arrest, Cain made oral admissions and gave a formal statement of the events surrounding the felony.

Calvin Williams, the actual shooter, was arrested on July 9, 1971.

At Cain's trial, the Commonwealth called Calvin Williams as a witness. Williams testified that there was a conspiracy between himself, Gerald Cain, and others to rob the deceased, that they carried out the plan, and

that in the course of the robbery and in the presence of relator, the victim was fatally shot. (N.T. 928-983).

Mr. Williams also testified that he was "high at the time" from the use of the drug methadrine. (N.T. 936). On cross-examination he testified that he was a heroin addict in May of 1971, that he used twelve to fifteen bags a day, and that on the day of the killing he was "high". (N.T. 1090-1093).

Williams further testified that on July 9, 1971, approximately one hour before being taken into custody, he had consumed one and one-half tablets of L.S.D. When he was questioned by the detectives on that day, and when his signed statement was taken, he was under the influence of the drug. (N.T. 988-1007).

On redirect, Williams testified that at present he was *not* under the influence of any drug and that he was testifying to the events of May 24, 1971, from memory. (N.T. 1112).

After the conclusion of the Commonwealth's case, the defense announced its intention to call Dr. James D. Nelson as an expert witness. (N.T. 1333-1347). Dr. Nelson, a psychiatrist, had experience with the treatment and rehabilitation of drug addicts and was instrumental in the launching of the Methadone Program. In the Judge's chambers, the defense explained that Dr. Nelson would testify to the effects of L.S.D. in inhibiting the user's ability to recall past occurrences and to determine whether the recollection was accurate or merely a drug-induced fantasy. The intention was to impeach the credibility of Calvin Williams by showing that as a result of the ingestion of L.S.D. shortly before questioning

in custody on July 9, 1971, Williams would have been unable to recall or relate the events surrounding the murder.

The Commonwealth objected to the testimony of Dr. Nelson, challenging the doctor's credentials and expertise, protesting that he had never examined Calvin Williams, and asserting that this witness' testimony at trial was an accurate recollection of the events of May 24, 1971, and that it was too late to challenge the competency of a witness who has already testified. (N.T. 1334-1337).

The Trial Judge sustained the objection and refused to allow the testimony. He reasoned that what was relevant was Williams' state of mind when he was on the witness stand—where he indicated he was not under the influence of drugs—and not his state of mind when he made his post-arrest statement to the police. The Judge was satisfied that Williams was testifying from his present clear and independent recollection, and not from the statement made to the police. (N.T. 1346, 1347, 1350).

On appeal, the divided Pennsylvania Supreme Court was confronted with relator's claim of denial of due process of law. Only Justice Eagen, in his opinion supporting affirmance of Cain's conviction, addressed the issue. Justice Eagen agreed with the Trial Judge's ruling that the expert testimony would be irrelevant, since at the trial itself witness Williams was not under the influence of drugs and was able to remember and testify to the events of May 24, 1971. *Commonwealth v. Cain,* 369 A.2d 1234, 1238 (1977).

Relator contends that the Trial Judge's determination that Calvin Williams clearly remembered what occurred was an arbitrary determination. He maintains that the psychiatrist should have been permitted to give answers to hypothetical questions adduced from the facts of the confessor-slayer's ingestion of drugs on the day of the incident and at the time of his arrest and statement to the police. Relator protests that the expert should have been allowed to testify to whether or not a person in Williams' drug-induced condition would be able to remember, perceive, and narrate.

While it is true, as relator asserts, that expert testimony has long been sanctioned for the purpose of attacking the credibility of a witness by showing the effect of drug use on memory, perception and narrative powers, the stated purpose of Dr. Nelson's testimony was to attack Williams' ability to give an accurate statement to the police on July 9, 1971. The offer of proof made by the defense at trial did *not* include a purpose to challenge the witness' *present* ability to testify to the events of May 24, 1971. (N.T. 1357).

As the Trial Judge reasoned, testimony affecting the credibility of the statement made to the police was irrelevant to the witness' present ability to testify. The judge heard lengthy argument on this issue. His evidentiary ruling was not an abuse of discretion.

III. *Failure of the Prosecution to Disclose Evidence Favorable to Defendant*

Relator contends that he was denied due process of law when a crucial prosecution witness was permitted to testify although the District Attorney knew, by virtue of a police memorandum in his possession prior to trial, that such testimony was false.

Debra Weintraub was called by the Commonwealth and testified to Cain's part in a plan to rob the victim and scare him with a gun. The events which led to Miss Weintraub's testimony are as follows.

Following his arrest on May 26, 1971, relator mentioned in a statement that a white girl named Debbie had been in a car with one Lynn Williams on the night of the killing. Cain also mentioned her in his trial testimony. The police were unable to locate Debbie until the time of trial. She was finally located by the District Attorney's office, at which time a statement was taken. (N.T. Post-Trial Motions 107-110).

Miss Weintraub testified that on the day of Glen Edward's death, she went to the Marriott Hotel with her boyfriend, Lynn Williams, in his automobile. Williams wanted to "pick up some money" (N.T. 1691). When they arrived at the Marriott, Williams got out of the car and returned with "Gerry", whom Debbie identified in court as the relator, Gerald Cain. (N.T. 1692). The two men then left the vehicle and returned with three other men. They all entered the car, in which Debbie was still sitting. Miss Weintraub related that a conversation ensued in which the men spoke of "holding somebody up." (N.T. 1694). The plan was to get "$500 plus grass" from someone. Debbie was told to pose as Cain's girlfriend, knock on the door of a hotel room, and remain quiet while Cain did the talking. (N.T. 1695). There was also a discussion about a pistol. Miss Weintraub saw the pistol being removed from the car's glove compartment, handed by Lynn Williams to Cain, and placed by Cain in his trousers. (N.T. 1696-1697). The plan was to frighten Glen Edwards in his motel room and

rob him of the money he had to purchase the marijuana. (N.T. 1698). When the group entered the Marriott, Miss Weintraub escaped and left the building. (N.T. 1700-1701). She ran into a police officer and "told him I was scared and that there was going to be some shooting." Miss Weintraub and the officer went into the Marriott lobby, where a taxi was called for her. (N.T. 1702, 1797).

As developed by other testimony, the victim was lured from the Marriott to a vacant house where he was shot and killed and robbed.

Miss Weintraub's testimony substantially contradicted that of the relator as to the activities of each of them on the night in question.

At trial, the prosecution had informed the defense of its intention to introduce Miss Weintraub's proposed testimony. Defense counsel objected that it had no prior notice she would be called, although he did interview the witness prior to her testimony and did receive a copy of her statement taken by the Assistant District Attorney.

At the time Miss Weintraub testified, the Assistant District Attorney had in her possession a statement of the Lower Merion Police Department prepared by the officer who encountered the witness after she ran out of the Marriott.[5] The incident report states:

> While on routine patrol, I observed a girl running south on Presidential Boulevard toward Monument Road.

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[5] This report was produced in a proceeding involving Lynn Williams following Cain's trial. The officer did not testify at Cain's trial.

> The victim stated she was going to a party at the Marriott Motor Lodge with Lynn Willens [sic], a boyfriend of the victim. She went to a room and observed six men. The girl got excited and ran out of the Marriott.
>
> Miss Weintraub was confused and admitted to having a nervous disorder.
>
> Communications contacted Curtis Macmillan of 4933 Walnut Street, Phila. Mr. Macmillan stated he would reimburse the United Cab Co. for the victim's transportation to his address. Victim was transported by United Cab Co.

Cain's counsel later received a copy of this incident report. Relator contends, as he did on his motion for a new trial, that Debbie's trial testimony was false because of its inconsistency with the police report, and that the district attorney knew of its falsity and was guilty of suppressing exculpatory evidence in failing to provide the court and the defense with a copy of the report at Cain's trial.

Relator points out that the suppressed police report indicated Miss Weintraub had been with one person, Lynn Williams, and that nothing is said about a robbery, a gun, or shooting, although Miss Weintraub testified under oath that she told the police officer of a possible shooting.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Relator argues that evidence which may be useful to impeach a witness is material to the guilt of an accused and may be the subject of prejudicial suppression violative of due process. *Coleman v. Maxwell*, 273 F. Supp 275 (D.C. Ohio, 1967), *aff'd* 399 F.2d 662 (6th Cir. 1967), *cert. denied* 393 U.S. 1058 (1968). He maintains that serious doubt exists as to witness Weintraub's credibility which is sufficient to vitiate the conviction.

Relator asserts that the Commonwealth deliberately breached its affirmative duty to disclose the contents of the police report of the trial court. The existence of the report, he maintains, provides material which could have been helpful for cross-examination and which could have led to further evidence helpful to the defense. This knowing use of false testimony and the suppression of contradictory evidence violated Cain's right to a fair trial.

The problem with relator's arguments is that nothing in the record warrants a conclusion that Miss Weintraub's trial testimony was false or inconsistent with what she told the police officer, *or* that the police report was exculpatory.

Miss Weintraub's trial testimony was more extensive and detailed than the report prepared by the police officer. It does not follow, however, that the two were inconsistent. The incident report was not a comprehensive summary of the events of the night of the crime, but was based on a brief conversation with a person in a very agitated state. Further, it contained no exculpatory information.

Relator's assertion that the alleged discrepancy indicates deliberate concealment of evidence favorable to him is without merit.

A copy of Miss Weintraub's in-custody statement to the District Attorney was given to Cain's counsel, and the defense did have an opportunity to interview her prior to her testimony. Further, as respondent points, out after Debbie's testimony in which the circumstances of her encounter with the police officer were explored, the lunch intervened and trial continued for several days after the conclusion of her testimony. The defense did not seize on the opportunity to subpoena the police officer who interviewed Miss Weintraub or to ascertain if there was a public record of his report at police headquarters.

On Cain's appeal to the Pennsylvania Supreme Court, Justice Eagen in his affirming opinion points out that, even if the defense had known about the police summary at the time of trial, it would have been unable to use it. 369 A.2d at 1241.

Although under Pennsylvania law relevant pretrial statements of witnesses in the Commonwealth's possession must, upon request, be made available to the accused during trial, *Commonwealth v. Kontos,* 442 Pa. 343; 276 A.2d 830 (1971), the case of *Commonwealth v. Morris,* 444 Pa. 364; 281 A.2d 851 (1971) suggests that summaries of statements can be used to impeach a witness only if the report is an accurate transcription of the witness' actual statement or was adopted or approved by the witness. Noting the relevance of the federally and state recognized distinction between a report that is a verbatim, signed, or adopted recordation of a witness' statement and a summary of what another undertook him to say, Justice Eagen explained the rationale to be:

> [I]t is unfair to allow the defense to use statements to impeach a witness which cannot fairly be said to be the witness' own rather than the product of the investigator's selection, interpretation, and recollection.
>
> 369 A.2d at 1241

There is no evidence that Debbie read, signed, or adopted the police summary or that it was a verbatim report of her statements to the officer. Under Pennsylvania law, therefore, it is doubtful that the defense was entitled to the police summary for impeachment purposes.

In sum, relator's due process rights were not violated. The allegations that Miss Weintraub's testimony was false and that the district attorney attempted to conceal from the defense evidence favorable to them are not supported by the record.

Accordingly, this United States Magistrate makes the following:

RECOMMENDATION

Now, this 15th day of December, 1977, it is RESPECTFULLY RECOMMENDED that the petition for a writ of habeas corpus be denied without an evidentiary hearing. There is probable cause for appeal.

(s) Peter B. Scuderi
Peter B. Scuderi
United States Magistrate